TIM BERGER: Hello. I'm Tim Berger and I want to thank you for choosing this session about the Affordable Care Act. Today, my co-presenter Anna Falkenstein and I are here to discuss the employer shared responsibility provisions of the law. Before we get started, let us tell you a little bit about ourselves. I currently serve as a tax law specialist in the Exempt Organizations office of the Tax Exempt and Government Entities division of the IRS.

ANNA FALKENSTEIN: And I serve as a tax law specialist in the Stakeholder Liaison office of the Small Business and Self-Employed division.

TIM BERGER: Okay so that's enough about us, let's move on. The information contained in this presentation is current as of May 18, 2015. For the latest information about tax provisions of the Affordable Care Act, visit irs.gov/aca. Today, we will cover the employer shared responsibility provisions found at Internal Revenue Code Section 4980H, which was added to the Code by the Affordable Care Act. The employer shared responsibility provisions are sometimes referred to as the "employer mandate" or "the pay or play provisions". Topics include determining applicable large employer or ALE status, defining full-time employees, liability for the Employer Shared Responsibility Payment, assessment and payment, and 2015 transition relief. We will also provide a brief introduction to information reporting requirements for certain employers. Let's begin.

OK, let's jump right in by reviewing what employers need to know. To start off, it's important to say that if an employer has fewer than 50 full-time employees, including full-time equivalent employees, the employer is generally not considered to be an applicable large employer. More specifically, an employer is not an applicable large employer for a calendar year if it has fewer than 50 full-time employees, including full-time equivalent employees based upon employment information from the prior year. We will discuss later how to determine whether an employer is an ALE. For now, as an introductory matter, we wanted to note that the majority of businesses fall below the applicable large employer threshold; that is fewer than 50 full-time employees including full-time equivalent employees.

There are some ACA provisions that apply only to applicable large employers. Those provisions are section 4980H, Employer Shared Responsibility Provision and section 6056, Information Reporting Provision. The Affordable Care Act does not require any employer including an applicable large employer to offer health insurance coverage to its employees.

However, an ALE may owe a payment under the employer shared responsibility provision, section 4980H(a) if it does not offer coverage to at least 95% of its full-time employees and their dependents and at least one full-time employee receives the premium tax credit. If an ALE does not owe a payment under section 4980H(a), an ALE will owe a payment under section 4980H(b) if it offers coverage to at least 95% of its full-time employees and their dependents but at least one full-time employee receives the premium tax credit, which could happen if the coverage that the employer offers is

not affordable or does not provide minimum value or if the full-time employee that receives the premium tax credit is not offered coverage.

An ALE will owe either the first payment I just described or the second payment I just described, if any, but not both. This is a "one or the other" type of provision. For purposes of determining who is a dependent under section 4980H, dependent means a child of an employee who has not attained age 26, but that does not include a foster child or a stepchild. Also, a spouse is not a dependent for purposes of section 4980H. Later in this presentation, we will discuss how an employer identifies its full-time employees and we'll discuss what it means for coverage to be affordable and provide minimum value. We will also explain in more detail when an employer shared responsibility payment applies and how it is calculated.

Let's now talk about when these provisions first will apply. For 2014, no employer shared responsibility payments will be assessed. In general, for 2015 and beyond, the employer shared responsibility provisions are effective. There are various types of transition relief for 2015, which we will discuss later. To mention one upfront, for employers with 50 to 99 full-time employees (including full-time equivalent employees), no assessable payments will apply for 2015, and the portion of the 2015 plan year ending in 2016 for employers with non-calendar year plans, as long as those employers meet two conditions that I will discuss later. At that time, we will discuss additional forms of transition relief that apply for 2015 as well.

This slide provides the basic rules about how an employer determines whether it is an applicable large employer, or ALE -- an employer with 50 or more full-time employees including full-time equivalent employees.

As I mentioned, if an employer is an ALE, it is subject to the employer shared responsibility provisions. Whether an employer is an applicable large employer is determined separately for each calendar year. To determine whether an employer is an applicable large employer for a particular calendar year, the employer uses information about the number of employees it employed and the employees' hours of service for the preceding calendar year. So for example, when an employer determines whether it is an ALE for 2016, it uses employment information from calendar year 2015. An employer is an applicable large employer if it has a combination of 50 or more full-time and full-time equivalent employees in the preceding calendar year. It is an average over all 12 months. When determining ALE status, a full-time employee for any calendar month is an employee who has on average at least 30 hours of service per week during that month or at least 130 hours of service per month.

Under the regulation, 130 hours of service in a calendar month is treated as the monthly equivalent of at least 30 hours of service per week, and the 130 hours of service monthly equivalency generally applies for determining full-time employee status. Shortly, we will discuss more details on the definition of full-time employee that applies for other purposes. An employer determines its number of full-time equivalent employees for each month by combining the number of hours of service of all non-full-

time employees for the month, but no more than 120 hours per employee, and dividing the total number for hours of service by 120.

One of the questions we hear often is how does an employer count employees to determine ALE status when the employer employs seasonal workers? The employer must count all of its employees including seasonal workers for purposes of determining ALE status. However, the regulations provide an exception for seasonal workers defined as an employee who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including retail workers employed exclusively during holiday seasons. If the employer had more than 50 full-time and full-time equivalent employees for 120 days or less and the excess over 50 were seasonal workers, the seasonal workers can be excluded from the count. As a result, the employer will not be an applicable large employer. This exception sounds complicated but the regulations include examples for counting seasonal workers.

Another important rule to be aware of is the requirement to combine companies with a common owner or that are otherwise related for purposes of determining ALE status. In other words, companies with a common owner or that are otherwise related generally are combined and treated as a single employer for determining ALE status. This rule is based on a long-standing code provision that also applies for other tax and employee benefit purposes. You can see section 414(b), (c), (m), or (o) of the Code, these are called the 414, or the Controlled Group Rules. If the combined number of full-time and full-time equivalent employees for the group is large enough to meet the ALE definition, then the group is an ALE and each employer in the group is called an applicable large employer member and is considered to be an ALE, even if separately the employer would not be an ALE. We'll look at an example in a few minutes.

I also want to mention a relevant transition rule. For purposes of determining ALE status for the 2015 calendar year, rather than being required to use the full 12 months of 2014 to determine applicable large employer status, and employer may measure during any consecutive six-month period during 2014. There are two final items to note before we get into some examples. First, note that although employers with a common owner or that are otherwise related are combined and treated as a single employer for determining ALE status, potential liability under the employer shared responsibility provisions is determined separately for each ALE member. Second, it's important to note that there are no exclusions from the definition of applicable large employer so that all employers, including tax-exempt organizations that are employers as well as government entity employers, that meet the definition are subject to the employer shared responsibility provisions.

Now that we've discussed the rules for determining applicable large employer status, let's work through an example. Here we have a relatively straightforward example of how the ALE determination is made when there are part-time employees to consider. Company X has 40 full-time employees and 20 part-time employees. Each part-time employee has 60 hours of service per month. As we just discussed, the number of full-time equivalent employees is calculated by determining the total number of hours of

service of all non-full-time employees for the month and then dividing the total number of hours by 120 which gives you the number of full-time equivalent employees. Using that formula in our example, 60 hours multiplied by 20 employees equals 1200 total hours. Then divide 1200 by 120, which gives us the number 10. So Company X has 10 full-time equivalent employees per month. Putting those pieces together, the number of full-time employees, 40, is added to the number of full-time equivalent employees, 10, to arrive at the total number of full-time and full-time equivalent employees, which is 50. Because the threshold is 50 or more, Company X with a combined total of 50 full-time and full-time equivalent employees is an applicable large employer. That means Company X is subject to the employer shared responsibility provisions.

Now let's look at an example of an employer that would not be subject to the employer shared responsibility provisions. Company Y has 20 full-time employees and 20 part-time employees. Each part-time employee has 60 hours of service per month. As discussed in the earlier example, the number of full-time equivalent employees is calculated by determining the total number of hours of service of all non-full-time employees for the month and dividing the total number of hours by 120. That gives us the number of full-time equivalent employees. So, in this example using this formula, 60 hours multiplied by 20 employees equals 1200 total hours. Then we divide the 1200 by 120 which gives us number 10. Company Y has 10 full-time equivalent employees per month. Then we add the number of full-time employees, 20, to the number of full-time equivalent employees, 10, to arrive at the total number of full-time and full-time equivalent employees. As you can see from the slide, this gives us 30 which is below the ALE status threshold of 50 or more employees. As a result, this employer is not an ALE and is not subject to the employer shared responsibility provisions for the year. This example assumes that Company Y is not a member of controlled group of employers that would be aggregated with another group of employers as previously discussed.

Okay, and here's that example of companies with common ownership that I mentioned previously. This slide shows Corporations A, B, and C. For all of 2015 and 2016, Corporation A owns 100% of all classes of stock of Corporation B and Corporation C. Corporation A has no employees at any time in 2015. For every calendar month in 2015, Corporation B has 40 full-time employees and Corporation C has 60 full-time employees. Corporations A, B and C are considered to be a controlled group of corporations under Section 414 of the Code. Both Corporation A and Corporation B individually do not meet the applicable large employer threshold. Corporation C does. Due to the application of aggregation rules for controlled groups, because Corporations A, B and C have a combined total of 50 or more full-time employees during 2015, Corporations A, B, and C are considered to be an applicable large employer for 2016. And Corporations B and C are each considered to be an Applicable Large Employer member for 2016. Corporation A is not an applicable large employer member for 2016 because it does not have any employees. Under the definition of ALE member in the regulations, which is at Treasury Regulation section 54.4980H-1(a)(5), an ALE member does not include an employer with no employees or employees with no hours of service for the calendar year. Because Corporation A is not an ALE member, it has no

information reporting responsibilities. Alright, now I'm going to hand off to Anna to continue our discussion.

ANNA FALKENSTEIN: Thanks, Tim. Now that we have discussed the applicable large employer definition, it is time to switch gears and discuss another important concept under the employer shared responsibility provision. That is, how an employer identifies its full-time employees. For context, the full-time employee definition is central to the Section 4980H . As we noted on slide six, an employer must identify its full-time employees to determine its ALE status.

Also, an employer must identify its full-time employees to determine to whom it needs to offer coverage to avoid an assessable payment, and the number of full-time employees provides a basis for a IRS calculation of the potential assessable payment. For purposes of the employer shared responsibility provisions, a full-time employee is, with respect to a calendar month, an employee employed on average of at least 30 hours of service per week or at least 130 hours of service per month. We will talk more about hours of service in a few minutes.

There are two methods that are used to determine who is a full-time employee for purposes of the employee shared responsibility provision. As you can see, there is the monthly measurement method and the look-back measurement method. Under the monthly measurement method, the employer determines whether an employee is a full-time employee on a month-by-month basis by looking at whether the employee has at least 130 hours of service for each month. For the look-back measurement method, the employers may determine the status of an employee as a full-time employee during what is referred to as the stability period, based upon the hours of service of the employee in the preceding period, which is referred to as the measurement period. Note that the look back measurement cannot be used to determine full-time employee status for the purposes of the applicable large employer status determination.

These methods set the minimum standards for identifying full-time employees and relate to whether the employer might owe an assessable payment but they do not limit in any way an employer's ability to offer coverage to a greater number of employees than just its full-time employees. An employer can always offer coverage to more than just its full-time employees. Now that we know that an employee with at least 130 hours of service in a month is a full-time employee, what is an hour of service? Basically, an hour of service is each hour for which an employee is paid or is entitled to be paid for the performance of duties for the employer or for a period of time during which no duties are performed, including due to holiday, vacation, illness, and other types of leave. An hour of service for this purpose does not include: an hour of bona fide volunteer service for a government entity or tax-exempt entity, for example, a volunteer firefighter; an hour of work performed as part of a federal work study program or comparable state or local work-study program; an hour for which compensation is not US-source income; and an hour worked for a religious order when work is performed under a vow of poverty.

There are special hours of service issues that the IRS and Treasury are continuing to consider and the preamble to the final regulations provides for employers to use a reasonable method of crediting hours of service for adjunct faculty, commissioned salespeople, airline employees with layover hours, and employees with on-call hours.

This slide provides information about determining whether an applicable large employer member will be subject to an employer shared responsibility payment. We mentioned this earlier today but I'm going to talk in more detail about it now. In the first scenario, the employer does not offer employer sponsored minimum essential coverage, also known as MEC, to at least 95% of its full-time employees and their dependents, and at least one employee receives the premium tax credit. In that case, the employer is liable for an employer shared responsibility payment. In this scenario, the employer may be offering coverage to some full-time employees and their dependents but less than 95%, or it may not be offering any coverage to any full-time employees. The key is that the coverage offered is to less than 95% of the full-time employees and their dependents. Please note that there is transition relief that applies for 2015 and for an employer with a non-calendar year plan, the portion of the 2015 plan year that ends in 2016. Under this transition relief, the employer will not owe this first type of employer shared responsibility payment as long as it offers MEC to at least 70% (rather than 95%) of its full-time employees and their dependents.

Although this presentation does not cover the eligibility requirements for the Premium Tax Credit, it is important to know that a fundamental requirement to be eligible for the premium tax credit is that individuals must purchase health insurance coverage through the health insurance marketplace.

In the second scenario, the employer does offer employer-sponsored minimum essential coverage to at least 95% of its full-time employees and their dependents (or to 70% for 2015). But despite that, at least one full-time employee receives the premium tax credit because either coverage was not offered to the full-time employee who received the PTC, for example, one of the 5%; the coverage the employer offers is unaffordable; or the coverage it offered did not provide minimum value.

Which scenario applies determines how the assessable payment will be calculated. That is, the payment calculation for the first scenario is significantly different than the payment calculation for the second scenario. We will explain the calculations in a minute but first we're going to talk about what the terms unaffordable and minimum value mean.

Before we discuss the potential payment amounts, let's define affordability and minimum value. Affordability is determined with respect to the employee's household income. If an employee's share of the premium for the employer-provided lowest cost self-only coverage would cost the employee more than 9.5% (indexed for future years) of that employee's annual household income, the coverage is not considered affordable for that employee. Household income generally includes the modified adjusted gross income of the filer, their spouse, and the income of dependents on the filer's tax return

who are required to file a tax return. If an employer offers multiple health care coverage options, the affordability test applies to the lowest-cost self-only MEC option available to the employee that also meets the minimum value requirements.

Because employers are not likely to know the household income of their employees the regulations provide 3 safe harbors for affordability for purposes of the employer shared responsibility provision, (and not for the premium tax credit purposes). The safe harbor methods are optional. An employer may choose to use one or more of these safe harbors for all of its employees or reasonable categories of employees providing it does so on a uniform or consistent basis for all employees in a category. Reasonable categories generally include: specified job categories; nature of compensation, for example salary or hourly; geographic location; and similar bona fide business criteria. If an employer uses an affordability safe harbor, the employer is treated as if it offered affordable coverage and will not be subject to an assessable payment for the failure to offer affordable coverage even if the employee receives a premium tax credit.

The first safe harbor is the Form W-2 safe harbor. If the employee's required contribution for the calendar year for the lowest cost self-only coverage that provides minimum value is not greater than 9.5% of the employee's form W-2 box one wages for the year, the coverage is considered to be affordable for purposes of the employer shared responsibility provision.

The next one is called the "rate of pay" safe harbor. In general, it's based on the employee's rate of pay and assumes 130 hours of service for the month regardless of actual hours of service.

The third one is the "federal poverty level" safe harbor, which provides that the coverage is affordable if it does not exceed 9.5% of the federal poverty level for a single individual. The final regulations contain a lot more information about these safe harbors.

Now let's move to "minimum value". How does an employer know whether the coverage it offers provides minimum value? To provide minimum value, a plan must cover at least 60% of the total allowed cost of benefits provided under the plan. Under Notice 2014-69, released on November 4, 2014, and HHS proposed regulations published on November 26, 2014, a plan also must provide substantial coverage of inpatient hospital and physician services to provide minimum value. IRS plans to publish regulations proposing this rule.

This requirement will apply when final regulations are published. HHS has created a minimum value calculator. By entering certain information about the plan such as deductibles and co-pays for the benefits the plan covers into the calculator, employers can get a determination as to whether the plan covers at least 60% of the total allowed cost of the benefits. The minimum value calculator is on the HHS website. You can go to cms.gov/cciio.

Next, I will talk about the amount of the employer shared responsibility payment. Here we have the methods used to calculate an employer shared responsibility payment. As you can see the employer shared responsibility payment is not a flat amount but it is based on the number of full-time employees and calculated on a monthly basis. The first bullet shows the payment if an employer does not offer minimum essential coverage to at least 95% of its full-time employees and their dependents and at least one full-time employee gets the premium tax credit by virtue of having purchased coverage through a health insurance marketplace. In this case, per year, the assessable payment is $2000 for each full-time employee, but by statute, the first 30 full-time employees are excluded from the calculation. On a monthly basis, that's $166.67 per month per full-time employee. Note that the $2000 amount will be indexed for inflation beginning in 2015.

Before moving on to the second bullet, I want to mention one form of transition relief that applies to the first bullet. For employers with 100 or more full-time employees including full-time equivalent employees for 2015, plus for an employer with a non-calendar plan year, the portion of the 2015 plan year in 2016, an employer's assessable payment will be reduced by 80 full-time employees rather than 30. This rule only applies to 2015.

The second bullet shows the calculation, when the employer does offer cover to at least 95% of their employees and dependents, but the coverage is either not affordable or does not provide minimum value. In this case, the annual payment is $3000 but it is not calculated based on all full-time employees, but rather it is based only on the number of full-time employees who received the premium tax credit. The monthly amount is $250 for each month for each full-time employee who receives the premium tax credit. As with the amount set out in the first bullet, the $3000 amount will be indexed for inflation beginning in 2015. Please note that the employer shared responsibility payment described in the second bullet cannot exceed the payment calculated by the method shown in the first bullet -- as if the coverage was not offered.

Also, as I mentioned before, each applicable large member is liable for its section 4980H assessable payment and is not liable for the payment for any other entity in the controlled group of entities. It's important to note that employers will not report or include an employer shared responsibility payment with any return that they may file. So how would an employer know if it was a shared responsibility payment? Based on information reported by the ALE member and employees, the IRS will contact the employer to inform it of any potential liabilities and the employer will be given an opportunity to respond before any assessments or notice and demand for payment is made. The employer will not be contacted by the IRS for a given calendar year until after its employees individual income tax returns are due for that year -- which would show any premium tax credits that the employees received. If it's determined that an employer is liable for an employee shared responsibility payment after the employer has responded to the initial IRS contact, the IRS will send a notice and demand for payment. That notice will instruct the employer how to make the payment.

Before we discuss this slide about 2015 transition relief, I want to remind everyone that no employer shared responsibility payments will be assessed for 2014. For more information about this transition relief, see the IRS Notice 2013-45, which was issued on July 9, 2013. We've already mentioned some of the transition relief that applies for 2015 as we've been discussing the nuts and bolts of the employer shared responsibility provisions today. We will now talk about a few additional forms of transition relief that we have not already addressed. So, first up on the additional forms of transition relief for 2015, plus the portion of the 2015 plan year that ends in 2016 year for an employer with a non-calendar year plan, no assessable payment under 4980H will apply for an employer with 50-99 full-time and full-time equivalent employees in 2014, provided that the employer meets the following criteria: First, during the period of February 9, 2014 through December 31, 2014, the employer does not reduce the size of its workforce or the overall hours of service of its employees in order to qualify for the transition relief. However, an employer that reduces workforce size or overall hours of service for bona fide reasons is still eligible for the relief. Second, during the period of February 9, 2014 through December 31, 2015 (or for employers with non-calendar year plans, ending on the last day of the 2015 plan year), the employer does not eliminate or materially reduce the health coverage, if any, it offered as of February 9, 2014.

Next on the slide is dependent coverage transition relief. Employers who take steps to provide dependent coverage will not be subject to any employer shared responsibility payments for 2015 plan year solely for failing to offer coverage to dependents for the 2015 plan year. But this relief is not available for an employee who was offered dependent coverage during the 2013 on 2014 plan year if the employer subsequently dropped the offer of coverage.

Transition relief is also provided to employers sponsoring non-calendar year health plans. Relief is available for the period in 2015 before the start of the 2015 plan year if certain conditions are met. To find out more about these rules, see the preamble to the final regulations for more details. Next on the slide is transition relief that relates only to January 2015. Generally, if an employer fails to offer coverage to a full-time employee for any day of the calendar month, that employee is treated as not offered coverage for the entire month. However, solely for the purposes of January 2015, if an employer offers coverage to a full-time employee no later than the first day of the first payroll period that begins in January 2015, the employee will be treated as having been offered coverage for January 2015.

The preamble to the final regulations also includes an interim rule for multi-employer plans. Employers may rely on the interim guidance until the IRS provides otherwise in future guidance. In addition, there is also additional transitional relief related to the look-back measurement method, which is described in the preamble to the final regulations. More detailed rules about all of the transition relief that we discussed today can be found in the preamble to the final regulations.

Now let's talk about the information reporting required of applicable large employer members. Section 6056 require annual reporting by applicable large employers relating

to the health insurance the employer offers or does not offer to its full-time employees and their dependents. Transition relief provides the first information returns are not due until 2016. Even though the first returns are not due until 2016 for the 2015 year, employers are encouraged to voluntarily file the information returns in 2015 for the 2014 year. As discussed in a previous slide, there is 2015 transition relief that provides no assessable payments under section 4980H will apply for an employer with 50-99 full-time or full-time equivalent employees in 2014 if certain conditions are met.

However, even though an employer may qualify for the relief under 4980H, it is still required to file Forms 1094-C and 1095-C for calendar year 2015. An employer will indicate on Form 1094-C whether it is eligible for transition relief. Similar to the Form W-2, the Form 1095-C must be furnished to the individual by January 31 of the year following the year to which the year relates. These are not due to the individuals until February 1, 2016 because January 31 is a Sunday. You can see this on the draft 2014 instructions for Form 1094-C and 1095-C. The Section 6056 information reporting is integral to the administration of the employer shared responsibility provisions. The employer uses the form 1094-C to report summary information to the IRS about the employer and uses the form 1095-C to report employee level data on the health coverage, if any, the employer offered to each of its full-time employees. The Form 1095-C is also used in determining eligibility or the premium tax credit.

As you can see on the slide, information to be reported includes: identifying and contact information of the ALE member; number of full-time employees; and information for each full-time employee including the coverage offered, if any, the lowest cost monthly self-only premium, and the months the employee was covered, if applicable.

Filers of 250 or more information returns must file returns electronically.

There are a couple of key points to remember about the employer shared responsibility provisions. First, these provisions do not apply if an employer has fewer than 50 full-time employees including full-time equivalent employees. Second, there is no payment owed with respect to employees that are not full-time employees, that is, employees with less than 130 hours of service in a month. Finally, no payment is owed if no full-time employee receives a premium tax credit. For example, if all of the employees are eligible for Medicare or Medicaid and therefore do not receive a premium tax credit, they would not be liable for an employer shared responsibility payment.

Okay, let's sum up what we've talked about. Generally, beginning January 1, 2015, applicable large employer members must EITHER offer affordable minimum essential coverage that provides minimum value to their full-time employees and must offer minimum essential coverage to their dependents OR they may be subject to an employer shared responsibility payment.

The payment will only apply if at least one of the ALE member's full-time employees receives the premium tax credit. Various forms of transition relief that apply for 2015 are set out in the preamble to the final regulations under the employer shared responsibility

provisions. Section 6056 requires annual information reporting by applicable large employers relating to the health insurance the employer offers or does not offer to its full-time employees and their dependents. Transition relief provides the first information returns are not due until 2016.

Here we have a resource page that has website addresses for the IRS and other ACA key agencies where you will be able to find more information about the Affordable Care Act. We've come to the end of our presentation. Thank you for attending.